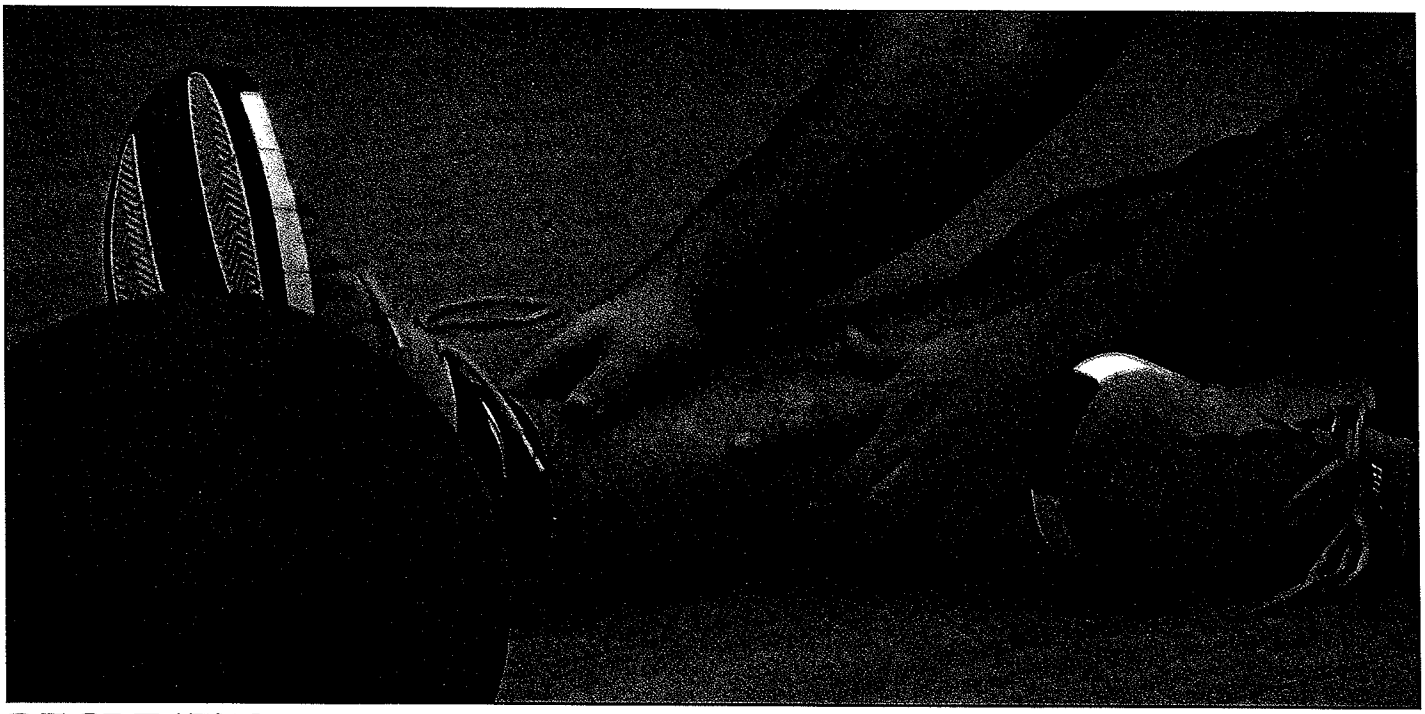

RECREATIONAL USE IMMUNITY: *Play at Your Own Risk*

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While some schoolchildren are playing tag in a playground, one of them slips while being chased by another child and gets severely injured from broken glass on the ground. In the same way that the child may have been immune from "getting tagged" by confining himself to "base," the location where the child suffered his injury may be a governmental entity's "base" and prevent it from being "tagged" with any liability for the injury.

The location where an injury occurred can have *everything* to do with whether there can be a recovery for an injury. The subject of this article is to review the coverage and development of the recreational use immunity provision of the Kansas Tort Claims Act (K.S.A. 75-6101 *et seq.*) that permits governmental entities to construct, operate, own, and use property that is used by the public for recreational purposes with little fear of liability.[1]

I. Immunity in General

Governmental entities have immunities not available to private entities. "State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected."[2] "Absent violation of constitutional rights, the [L]egislature may control governmental immunity,"[3] and a state may therefore waive any or all aspects of its sovereign immunity.

Immunity from suit is a fundamental aspect of the sovereignty that states, including the state of Kansas, enjoy.[4] Governmental entities can be absolutely immune from suit or can be immune from liability. The difference between immunity from suit and immunity from liability is significant. When a sovereign is immune from suit, it is immune from all the rigors of litigation, including discovery, and is entitled to have a case immediately dismissed. When a sovereign is immune from liability, it may have to participate in specific litigation until the sovereign can satisfy its burden to the court that it meets the conditions necessary for immunity from liability.

The state of Kansas, through the Legislature, has waived its sovereign immunity from suit in state court by passing the Kansas Tort Claims Act (KTCA).[5] The KTCA is an open-ended act where liability is the rule and immunity the exception.[6] After passage of the KTCA, governmental entities are not immune from suit; however, governmental entities may still be immune from *liability* under the right circumstances. In order to avoid liability, a governmental entity now has the burden of proving that the claim falls within one of the enumerated circumstances listed in K.S.A. 75-6104.[7]

FOOTNOTES

1. K.S.A. (2006 Supp.) 75-6104(o). All references to the recreational immunity provisions of the Kansas Tort Claims Act shall be to the 2006 Supplement. *See* annotations to former K.S.A. 75-6104(n) for early cases involving recreational use immunity.

2. *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd.*, 527 U.S. 666, 682, 119 S. Ct. 2219, 144 L.Ed. 2d 605 (1999); *see also Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240, 144 L.Ed. 2d 636 (1999); *Schall v. Wichita State Univ.*, 269 Kan. 456, 7 P.3d 1144 (2000).

3. *Brown v. Wichita State Univ.*, 219 Kan. 2, 7, 547 P.2d 1015, 1021 (1976).

4. *Alden*, 527 U.S. at 713, 119 S. Ct. at 2247.

5. K.S.A. 75-6103(a).

6. *Hopkins v. State of Kansas*, 237 Kan. 601, 609, 702 P.2d 710, 318 (1985).

7. *Barber v. Williams*, 244 Kan. 318, 320, 767 P.2d 1284, 1286 (1989).

II. Recreational use Immunity Under the Kansas Tort Claims Act

In K.S.A.75-6104, the Legislature has retained specific types of immunity from liability. The Legislature has also extended sovereign immunity under the KTCA to include other governmental entities. In the exception that is the subject of this article, the Kansas Legislature has retained immunity from liability for governmental entities and their employees for injuries to persons and property resulting from the recreational use of public property, absent gross and wanton negligence.[8] K.S.A. § 75-6104(o) states:

> 75-6104. Liability of governmental entities for damages caused by employee acts or omissions, when; exceptions from liability. A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from:
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> ***
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> (o) any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground, or open area for recreational purposes, unless the governmental entity or an employee thereof is guilty of gross and wanton negligence proximately causing such injury.

A. Immunity from liability for negligence occurring on recreational use property – Location, location, location.

Recreational use immunity applies to all activity located on recreational use property, regardless of the location of the property. For example, the immunity has been applied to injuries at indoor[9] and outdoor[10] facilities, on a school playground,[11] at swimming facilities,[12] on a green space open to the public used for unsupervised sledding,[13] on a city-owned baseball diamond during a supervised baseball game,[14] to fans[15] and players at NCAA sporting events,[16] and in a wrestling room used for noncompulsory wrestling practice.[17] The application centers around the location of the injury.

"In order for a location to fall within the scope of K.S.A. 75-6104(o), the location must merely be 'intended or permitted to be used ... for recreational purposes.' The injury need not be the result of 'recreation.'"[18] As explained in more detail below, recreational use immunity protects a governmental entity and its employees from simple negligence on recreational use property. Stated another way, a person who is injured on recreational use property will not recover damages for his or her injuries caused by simple negligence, period.

The leading cases on recreational use immunity are the *Jackson v. U.S.D. 259* cases.[19] In *Jackson* several junior high students were horsing around after physical education class, but prior to hitting the showers. The students were using a springboard to dunk a basketball. The plaintiff fell and suffered compound fractures in his right forearm. The plaintiff successfully argued that the gymnasium where he was injured was used at the time of the injury for physical education *classes*. However, this argument was insufficient for the plaintiff to avoid immunity under the recreational use exception to the KTCA. Under K.S.A. 75-6104(o), if a school gymnasium is used for recess, extracurricular events, or other recreational, noncompulsory activities, K.S.A. 75-6104(o) applies, provided that the recreational use was more than incidental.[20] The case was remanded back to the district court for a factual determination whether the school gymnasium is intended or permitted to be used for recreational purposes.[21] Upon remand, the defendant school district moved for summary judgment. The school district presented substantial competent evidence the gymnasium in question was used for noncompulsory recreational purposes, such as basketball, soccer, arts, crafts, and cheerleading, even though the injury occurred during a compulsory physical education class. The district court found the gymnasium was permitted to be used for more than incidental "recreational purposes."[22] On appeal,[23] the Court of Appeals affirmed the district court decision finding the gymnasium where Jackson was injured was a "recreational use" facility.

The Supreme Court took its ruling in *Jackson* one step further in *Wilson v. Kansas State University,*[24] where the Court held immunity under the recreational use exception of the KTCA extends to restrooms integral to public property intended or permitted to be used as a park, playground, or open area for recreational purposes. The plaintiff in *Wilson* alleged that she was injured while sitting on a toilet seat in a Kansas State University stadium while taking a pause from spectating at an intercollegiate football game. The high court concluded

8. K.S.A.75-6104(o).

9. *Jackson v. Unified Sch. Dist. No. 259*, 268 Kan. 319, 995 P.3d 844 (2000); *Wright v. Unified Sch. Dist. No. 379*, 28 Kan. App. 2d 177, 14 P.3d 437 (2000).

10. *Nichols v. Unified Sch. Dist. No. 400*, 246 Kan. 93, 785 P.2d 986 (1990).

11. *Lanning v. Anderson*, 22 Kan. App. 2d 474, 921 P.2d 813 (1996).

12. *Gonzales v. Bd. of Shawnee County Comm'rs*, 247 Kan. 423, 799 P.2d 491 (1990); *Robison v. State of Kansas*, 30 Kan. App. 2d 476, 43 P.2d 821 (2002).

13. *Boaldin v. Univ. of Kansas*, 242 Kan. 288, 747 P2d 811 (1987).

14. *Willard v. City of Kansas City*, 235 Kan. 655, 681 P.2d 1067 (1984).

15. *Wilson v. Kansas State Univ.*, 273 Kan. 584, 44 P.3d 454 (2002).

16. *Molina v. Christensen*, 30 Kan. App. 2d 467, 44 P.3d 1274 (2002).

17. *Wright*, 28 Kan. App. 2d at 177, 14 P.3d at 437.

18. *Jackson*, 268 Kan. at 326, 995 P.3d at 849. Justices Lockett and Allegrucci dissent from this part of the holding. The dissent would require the property be intended or permitted to be used for recreational purposes *and* further require the injury occur as the result of a recreational activity. The dissent contends that under the majority opinion a governmental entity is immune in the case of a worker injured fixing a light bulb at a recreational facility. *Jackson*, 268 Kan. at 335, 995 P.3d at 854 (Lockett & Allegrucci, JJ., concurring in part and dissenting in part).

19. *Jackson v. Unified Sch. Dist. No. 259*, 26 Kan. App. 2d 111, 979 P.2d 151 (1999), *rev'd*, 268 Kan. at 319, 995 P.3d at 844; *Jackson v. Unified Sch. Dist. No. 259*, 29 Kan. App. 2d 826, 31 P.3d 989 (2001) (appeal following remand).

20. *See Jackson*, 268 Kan. at 333, 995 P.3d at 853 (Lockett & Allegrucci, JJ., concurring in part and dissenting in part).

21. *Jackson*, 268 Kan. at 333, 995 P.2d at 853.

22. *Jackson v. Unified Sch. Dist. 259*, No. 96-C-2325 (Sedgwick County Kan., Dist. Ct., Oct. 13, 2000).

23. *Jackson*, 29 Kan. App. 2d at 826, 31 P.3d at 989.

24. *Wilson*, 273 Kan. at 584, 44 P.3d at 454.

while restrooms independently have a nonrecreational usage, they serve no purpose but for the recreational nature of the public property, and thus, they are "necessarily" connected to the property by plan, rather than being "incidentally" connected.

In *Lane v. Atchison Heritage Conference Center,*[25] the Kansas Supreme Court reversed a decision of the Court of Appeals that would have raised additional hurdles to recreational use immunity.[26] The Atchison Heritage Conference Center (AHCC) is a multi-use facility. On the night of the accident that spawned the lawsuit, the AHCC was used for a New Year's Eve dance, a clearly recreational use. The plaintiff was a member of the band who slipped and fell on ice while loading his equipment after the dance. The allegations were that a negligent employee of the facility dumped water on the loading dock that froze and caused the plaintiff to slip and fall. The district court found recreational use immunity was applicable and granted summary judgment. The Court of Appeals reversed holding the "primary purpose" of the AHCC was not recreational.

On review, the Kansas Supreme Court refused to follow the "primary purpose" doctrine articulated by the Court of Appeals. The Court stated the recreational use immunity statute should be read "broadly" and "Kansas courts should not impose additional hurdles to immunity that are not specifically contained in the statute."[27] A particular facility must be viewed collectively to determine whether it is used for recreational purposes, so that the facility qualifies for recreational use exception to tort liability under the KTCA.[28] It found immunity under K.S.A. 75-6104(o) does not depend upon the "primary use" of the property but rather depends on the character of the property in question.[29] The correct test to be applied is whether the property has been used for recreational purposes in the past or whether recreation has been encouraged.[30]

The Kansas Court of Appeals has taken the rebuke of the Kansas Supreme Court in *Lane*[31] to heart with its latest ruling. In *Poston v. Unified School District No. 387,*[32] a parent of a child who was playing basketball at a school gymnasium came to school to pick up the child from practice when one of the brackets on a door located at the entrance to the school came loose, and the door fell on the plaintiff as he left the building injuring him. The door, located between the outside of the building and the school commons area, was not the entrance to the gym. The district court reasoned, and the Court of Appeals affirmed, that the commons area was "an 'appendage' to the gymnasium such that it qualified under the recreational use exception."[33] The Court of Appeals concluded it was following the Supreme Court ruling in *Wilson*[34] and the Court of Appeals ruling in *Robison*[35] when finding that the commons area was essentially part of the recreational use area.

Judge Patrick D. McAnany issued a respectful dissent.[36] He concluded that recreational use immunity should not apply because the plaintiff was injured going through a door that was between the outside of the school and the school commons area, neither of which were used for recreational purposes. In his opinion, the fact the person was injured in an area "adjacent" to a recreational area was not sufficient to invoke the protections of K.S.A. 75-6104(o). Based on the tone of his dissent, McAnany may have come to a different conclusion if the injury had occurred in a doorway between the commons area and the gymnasium where the property was used for recreational purposes.

In *Wright v. U.S.D. 379*[37] the issue was whether a wrestling room at the Clay Center Community High School was used for recreation or for educational purposes. The plaintiff was a member of the school wrestling team who was injured during wrestling practice. The wrestling room, weight room, and gymnasium were part of the high school's physical education facility. During the school day, these facilities were used by the school for physical education activities. When the facilities were not used for physical education, the wrestling room, weight room, and gymnasium were open to the public for weightlifting, aerobics, and wrestling. The facilities were used for professional wrestling matches, twirling, alumni basketball, kids' wrestling, and pep rallies. Being a member of the school wrestling team was found to be a noncompulsory, extracurricular, and recreational activity. The Court of Appeals

25. *Lane v. Atchison Heritage Conf. Ctr.*, 283 Kan. 439, 153 P.3d 541 (2007).
26. *Lane v. Atchison Heritage Conf. Ctr.*, 35 Kan. App. 2d 838, 134 P.3d 683 (2006), *rev'd.* 283 Kan. 439, 153 P.3d 541 (2007).
27. *Lane*, 283 Kan. at 445, 153 P.3d at 546.
28. *Id.*
29. *Id.*
30. *Id.*, 283 Kan. at 447, 153 P.3d at 547.
31. *Id.*, 283 Kan. at 445, 153 P.3d at 545.
32. *Poston v. Unified Sch. Dist. No. 387*, 37 Kan. App. 2d 694, 156 P.3d 685 (2007).
33. *Id.*, 37 Kan. App. 2d at 695, 156 P.3d at 687.
34. *Wilson*, 273 Kan. at 584, 44 P.3d at 454.
35. *Robison v. State of Kansas*, 30 Kan. App. 2d 476, 43 P.3d 821 (2002).
36. The Kansas Supreme Court will hear oral argments in *Poston* on Jan. 29, 2008 at 9 a.m.
37. *Wright*, 28 Kan. App. 2d at 177, 14 P.3d at 437.